



Clean Water Action

Testimony presented before the
House Great Lakes and Environment Committee
by Cyndi Roper, Great Lakes Policy Director
February 28, 2008

Good afternoon, Chairwoman Warren and Members of the Committee. Thank you for the opportunity to speak with you today. My name is Cyndi Roper and I'm the Great Lakes Policy Director for Clean Water Action. I'm here today representing our more than 235,000 Michigan members who are committed to ensuring the Great Lakes remain great and that our inland waterways receive the protections they need to sustain them for future generations.

We are also part of the Great Lakes, Great Michigan Coalition, which is a growing and diverse coalition currently representing the 60 organizations listed at the end of my testimony. Clean Water Action fully supports the position of the Great Lakes, Great Michigan Coalition and has served as a steering committee member with that coalition since its founding in 2005.

We appreciate the efforts between the various stakeholders to reach a compromise agreement. Clean Water Action did not support the 2006 legislation but we look forward to supporting the 2008 package if the remaining outstanding issues have been resolved to our satisfaction. These specific issues include how the zone lines are drawn, who is required to get a permit and what are the permit requirements. Clean Water Action has supported the numerous compromises the Great Lakes, Great Michigan coalition has offered and, despite insinuations made by some stakeholders, we have very worked hard to secure a successful outcome.

My comments today will focus on the critical need to ensure our public waters remain under public control forever.

Why does this matter? Because this debate is not about the current large quantity water users or, for the most part the large quantity water users of tomorrow. It's really about creating a first line of defense where the state – on behalf of the people – has the **ABILITY some day** when it really matters to say “no” to a proposed large quantity withdrawal if it is not in the public interest.

It's about the state having the ABILITY to act on behalf of the people of Michigan. This legislature will be making a critical decision about how much water can be taken away from our waterways before local farmers, local businesses, local tourism officials and local residents have their collective interests considered.

I am not an attorney but Clean Water Action and the Great Lakes, Great Michigan coalition have been advised by some of the best environmental legal minds in Michigan. And our position is supported by Governor Milliken as noted in the letter to state lawmakers I'm providing with my testimony.

An excerpt from Governor Milliken reads: "Under principles of international trade law, states must be clear and emphatic about imposing conservation standards for use within their borders, and **reserving rights and authority as sovereign owner on behalf of the people of all waters of the state, including the Great Lakes within our borders.** Because all of the Great Lakes and most of our lakes and streams are protected by the public trust doctrine, it is important that this principle also be preserved and applied without diminishment or dilution. A compromise of protective and public trust principles now will jeopardize our ability to protect our waters from abuse in the future."

The Michigan Supreme Court ruled that: *"So long as the water flows and fish swim in [the river], the people may fish at their pleasure in any part of the stream subject only to the restraints and regulations imposed by the State. In this right they are protected by a high, solemn and perpetual trust, which it is the duty of the State to forever maintain."* Michigan's waters are a shared or common resource that can be "reasonably used" but not owned.

When Michigan began exercising its public trust duties to protect the state's water, scientists did not understand the connections between groundwater and surface waters. Today these connections are accepted as fact, and Michigan's laws should be updated to reflect this scientific truth. Simply put, excluding groundwater from public trust protections is archaic.

Some have stated we should just leave public trust to the case law and keep it out of the permitting requirements of the Michigan's water use statute.

However:

- The Legislature has already declared that groundwater is a public trust resource – it is part of the “waters of the state” and part of the “waters of the Great Lakes.” So whether the public trust applies to groundwater is not a common law question anymore – the Legislature already decided that it is.
- Once a resource is protected by the public trust, the state is obligated to act as a trustee for that resource. In other words, once you have decided the public trust applies, you have to apply it.
- Applying the public trust is done by protecting the resource for the use of future generations. That means determining that the public trust will be protected before making a permit decision involving that resource. To do otherwise would be like having a speed limit law but not requiring speedometers or speeding tickets.
- This is not some novel idea; it comes from a decision of the U.S. Supreme Court, which said 110 years ago that states must have standards in their laws to protect public trust resources.
- Michigan has always followed this directive. All of our other permitting statutes that involve public trust resources require the state to consider the public trust before issuing a permit. Part 301 (Inland Lakes and Streams) says the DEQ shall issue a permit if and only if the activity “will not adversely affect the public trust.” Part 325 (Great Lakes Submerged Lands) says the DEQ may lease bottom lands to a private party only “after finding that the public trust in the waters will not be impaired or substantially affected.”
- The assessment tool has value, but it only assesses impacts to fish populations. While fish are one thing the public trust protects, it also protects public *uses*. Keeping enough water in a river to float a boat or tube is a public trust obligation. So is keeping enough water in a river to swim in. So is keeping enough water in a lake so people can use their docks. So is keeping enough water in a lake so people can use public access sites.

Some have stated that extending public trust to groundwater will diminish private property protections, which could result in a “takings” of private property rights.

These bill packages specifically reserve riparian rights and property rights for lawful use of water. The ‘takings’ would actually occur when water is taken from local watersheds and affect the rights of riparian users. As Cooley Law Professor Chris Shafer recently testified, the House legislation offers greater regulatory certainty and better public oversight of our water resources by lowering the threshold of withdrawals subject to regulatory review.

Others have argued that extending public trust to groundwater will harm business interests.

However, these bill packages offer greater regulatory certainty for businesses by explicitly stating the public trust decision-making criteria in statute thereby requiring the Michigan Department of Environmental Quality to use these criteria in their permit review process.

Michigan’s water is key to our past and present way of life, and the Great Lakes, Great Michigan coalition is striving to ensure we sustain our most prized natural resource for the future. Whether for agricultural, business, domestic or recreational use, we need to institute safeguards to assure water is available to serve our needs in the future.

Thank you for listening to our comments this afternoon. We look forward to supporting legislation that assures the public interest is at the center of Michigan’s water laws.

Great Lakes, Great Michigan Coalition
as of 2.28.08

• Bazzani Associates • Burt Lake Preservation Association • Citizens for Alternatives to Chemical Contamination • Clean Water Action • Clinton River Watershed Council • Detroit Audubon Society • Detroit Riverkeeper • Detroiters Working for Environmental Justice • East Michigan Environmental Action Council • Ecology Center • Environment Michigan • Flint River Watershed Coalition • Freshwater Future • Global Infusion • Grand Rapids Dominican Sisters • Grand Rapids Institute for Information Democracy • Great Lakes Bioneers • Greening of Detroit • Huron River Watershed Council • Indian River Chamber of Commerce • Interface Fabrics • Justice and Peace Task Force of Plymouth United Church in Christ • League of Women Voters of Michigan • Lott3Metz Architecture, LLC • Macomb NOW • Michigan Association of Paddlesport Providers • Michigan Citizen Action • Michigan Citizens for Water Conservation • Michigan Coalition on the Environment and Jewish Life • Michigan Division of the Izaak Walton League • Michigan Environmental Council • Michigan Farmers Union • Michigan League of Conservation Voters • Mid-Michigan Environmental Action Council • Muskegon Save Our Shoreline • Northern Michigan Environmental Action Council • Onsite Wastewater of Northwest Michigan • Panthers for Social Justice • Paul H. Young Chapter, Trout Unlimited • Pere Marquette Watershed Council • Pickerel-Crooked Lakes Association • Progress Michigan • The Religious Coalition for the Great Lakes • Republicans for Environmental Protection • SEEDS • Sierra Club, Michigan Chapter • Sisters of Mercy Regional Community of Detroit • Sisters, Servants of the Immaculate Heart of Mary • St. Clair Channel Keeper • Superior Watershed Partnership • Sustainable Research Group • Thomas J. Newhouse-Design • Tip of the Mitt Watershed Council • Trillium Haven Farm • Voices for Earth Justice • The Watershed Center Grand Traverse Bay • West Michigan Environmental Action Council • White Lake Association • White River Chapter of Michigan Salmon and Steelheaders Association • White River Watershed Partnership • Yellow Dog Watershed Preserve

William G. Milliken

January 29, 2008

Dear Legislator:

Thank you for your concern about the Great Lakes. I am writing to encourage you to carefully consider the enclosed article, which makes clear what is at stake in your action this year on the Great Lakes compact.

It's especially important to note the relationship between the compact and clear, protective Michigan water law standards. Without the latter, this year's legislation could be an invitation to those outside of Michigan to export or divert water. Under principles of international trade law, states must be clear and emphatic about imposing conservation standards for use within their borders, and reserving rights and authority as sovereign owner on behalf of the people of all waters of the state, including the Great Lake within our borders. Because all of the Great Lakes and most of our lakes and streams are protected by the public trust doctrine, it is important that this principle also be preserved and applied without diminishment or dilution. A compromise of protective and public trust principles now will jeopardize our ability to protect our waters from abuse in the future.

Sincerely,

A handwritten signature in black ink, appearing to read "William G. Milliken", with a stylized, cursive script.

William G. Milliken

Executive Summary

Navigating the Great Lakes Compact: Water, Public Trust and International Trade Agreements

by James M. Olson¹

2006 Mich. St. L. Rev. 1103 (Published, Dec. 2007)

The Great Lakes Compact awaits action on the floor of the Michigan Senate and House of Representatives.

This timely article,² *Navigating the Great Lakes Compact: Water, Public Trust, and International Trade Agreements*, ties together state water law, the Compact, and the risks imposed by international trade agreements that could cripple efforts to protect the waters of Michigan and the Great Lakes Basin. Should states want to adopt the Compact “as is,” the article points out the flaws and defects in the Compact that must be cured or addressed by states through separate tie-barred water law amendments before the Compact is enacted. If this is not done in a proper and thorough manner, the purposes of the Compact’s protection of the Great Lakes will be seriously eroded.

The Great Lakes Basin is home to 30 million people and 20 percent of the world’s freshwater lakes and streams. These magnificent lakes and streams endow the Great Lakes region with a rich, diverse heritage of wildlife, environment, commerce, recreation, and community unparalleled in the world. Yet their very magnificence could spell the doom of this precious heritage. The demands for water throughout North America and around the world, accelerated by climate change, may well drain the flow, level, and life of these waters.

The Great Lakes and all of their tributary watercourses have been recognized as a public resource subject to a public trust. The public trust doctrine is central to water law and policy for present and future generations. The State of Michigan, as trustee, has a “high, solemn, and perpetual duty”³ to manage these public treasures for the common good of citizens for their survival, fishing, boating, navigation, and recreation. Under principles long enshrined by the U.S. and Michigan Supreme Courts, the public trust and the public’s title and uses are inviolate and cannot be subordinated. These waters cannot be transferred or disposed of without:

An express legislative authorization and adherence to these principles; and

¹L.L.M., (Public Lands and Natural Resources, Environment), University of Michigan; J.D., Detroit College of Law; B.A., Michigan State University. Senior principal, Olson, Bzdok & Howard, P.C., Traverse City, Michigan. The views are the author’s and not those of his clients or firm.

²The article is one of several presented at “The Great Lakes-St. Lawrence River Basin Compact and Agreement: International Law and Policy Crossroads,” Second Annual Conference on Trade and Investment in the Americas, Michigan State University College of Law, Dec. 1-2, 2006, Chicago, Illinois. The presentations are collected in a special symposium issue, Special Issue No. 5, Michigan St. Univ. Law Rev. (Vol. 2006). The symposium can be accessed at http://msulr.law.msu.edu/issue2006_5.html.

³*Collins v Gerhardt*, 237 Mich 38, 211 NW 115 (MI Sup. Ct., 1926).

A clear legislative determination that the principle that these magnificent natural advantages may not be impaired. Significantly, the cumulative effects of small repetitive impairments, small or nibbling effects together constitute impairment because of the unguarded precedent that would impair the public trust and undercut its protected uses.⁴

Unfortunately the Great Lakes Compact, as introduced in the Legislature, does *not* embody or apply these principles. In order to fulfill the perpetual and high duty to protect the public trust and title in these waters from appropriation and harm under claims that will assuredly be asserted under the NAFTA and other international trade agreements, the State *at the moment it enacts the* Compact must also enact amendments to its state water law. These amendments must impose standards and limitations that equal or exceed the protections provided by the public trust doctrine and the environmental standards demanded by the need to protect and conserve these waters. Failure to do so will expose Michigan's water to major exploitation and export, and put our citizens and businesses at a serious disadvantage when it comes time to compete against powerful outside interests, particularly when it comes time to further regulate water withdrawals or exports because of future needs, risks, or unforeseen circumstances. Uncorrected, current water law and the Compact, in effect, would allocate a portion of Michigan's waters for private exploitation or export. Once the floodgate is opened or the bottle uncorked, international trade law or federal and state constitutional provisions will make it difficult if not impossible to close.

There is near unanimous agreement within the Basin that these waters should not be exposed to diversions and export to other areas in the country, North America or the world. The Great Lakes Compact's major features prohibit diversion of waters outside of the Great Lakes Basin. However, the integrity and strength of the diversion ban is premised on a showing by the states that they are committed to standards for conservation and the protection of the environment, public health, and general welfare imposed by the states that are equal to or greater than the standards contained in the Compact. Failure of a state at the time of enactment of the Compact to expressly protect, by tie-barred state law, the public trust and to impose equal or more stringent standards than the Compact would announce to the world that the diversion ban is not necessary. Worse, such a legal and policy failure would open up Michigan's and Great Lakes' waters to claims of ownership, control, and diversion or export on the part of interests outside of Michigan or the Basin under NAFTA and international trade agreements or the commerce clause of the United States Constitution. The heart of Michigan's waters and State's desire to protect its citizens, farms, businesses, property owners, communities, and guests would be jeopardized if not lost.

Mr. Olson's article points out the heritage and principles – beacons of light – that have formed the basis of protecting the state's waters and their uses. The article explains how the Compact and current state water law are flawed unless the state plugs the holes in the Compact through the simultaneous enactment of state water law amendments. The article maps a reasoned approach for tie-barred amendments to state water law to live up to the public trust and cure or minimize the risks threatened by the defects in the Compact and current state water law.

⁴*People v Broedell*, 365 Mich 201, 112 NW2d 517 (MI Sup Ct. 1961).